Act's objectives; and (iii) whether the transaction promises to yield affirmative public interest benefits.[36]

The analysis also includes an evaluation of the likely competitive effects of the transaction and whether the proposed transfer creates a significant likelihood of competitive harm.[37] On this issue, more than mere speculation is required.[38] At the same time, Chairman Powell has stated his intention that the Commission subject proposed mergers to careful "rules-based" scrutiny and otherwise focus its inquiry in a manner that limits duplication of effort between its own review and the work of the agencies charged with evaluating such transactions under the antitrust laws.[39]

Each of the fundamental questions considered by the Commission as part of its analysis is addressed below. The unavoidable conclusion is that the proposed merger of ECC and Hughes is manifestly in the public interest. The synergies created by the combination will create substantial public interest benefits with respect to MVPD competition,[40] new programming and other content, and improved broadband services for millions of Americans. The transaction will create an integrated, spectrally efficient, full-service satellite competitor that is truly equipped to combat the dominance of incumbent

---

[36] *See, e.g., Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547 ¶ 1 (2001)("*AOL/Time Warner*"); *MCIT,* 15 Comm. Reg. (P&F) 1038, ¶ 7.

[37] *Id.*

[38] *See, e.g., United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 122 (1975) ("The Clayton Act is concerned with 'probable' effects on competition, not with 'ephemeral possibilities.'") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)); *see also United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990).

[39] *See* "Powell Offers Views on CLEC Woes, Spectrum Policy," Communications Daily, May 23, 2001, at 5. "Powell Urges Restraint in FCC Merger Reviews," Communications Daily, Dec. 11, 1998, at 1; *cf. AOL/Time Warner*, 16 FCC Rcd. at 6555 (concurring statements).

[40] *See* Willig Decl. at ¶¶ 21-25.

cable Multiple System Operators ("MSOs"), and to provide new and expanded services, including state-of-the-art broadband services, to consumers in both urban areas as well as underserved and rural areas. At the same time, the structure of the market in which the combined entity will compete, as well as the combined entity's commitment to non-discriminatory pricing and service, prevent the merger from posing any risk of harm to the public interest. Accordingly, the Commission should not only grant this application – it should do so expeditiously.

A. The Transaction Will Comply With the Requirements of the Communications Act, All Other Applicable Statutes, and With the Commission's Rules.

The proposed transaction does not implicate any foreign ownership, aggregation, cross-ownership, or any other restrictions imposed by the Communications Act, Commission regulation or applicable statute. Both ECC and Hughes are currently shareholders of a number of companies that are Commission licensees, and New EchoStar's Chief Executive Officer will be Mr. Charles W. Ergen, now Chief Executive Officer of ECC. The qualifications of all relevant parties are therefore a matter of record before the Commission. The combined entity will not have alien ownership that even approaches the benchmark of any applicable foreign ownership rule.[41] Nor does the proposed merger implicate any Commission rule or policy governing cross-ownership or MVPD programming relationships.[42]

---

[41] While ECC has received from the Commission a waiver of certain foreign ownership rules (to the extent applicable) to allow an investment from an Australian corporation, News Corp., that investment is now well below 5% and nowhere near the 25% limit of these rules to the extent they apply. *See In re Application of MCI Telecommunications Corp.,* File No. 73-SAT-P/L-96, FCC 99-110 (rel. May 19, 1999).

[42] AOL Time Warner Inc. has an indirect ownership interest in DIRECTV, which would represent less than a five percent interest in the combined company.

B. The Transaction Will Not Impair Any Statutory Objectives and Will Yield Substantial Affirmative Public Interest Benefits

Far from impairing any statutory policies or objectives, the proposed transaction will in fact further the important Commission policies in favor of vigorous competition, the efficient use of spectrum and satellite resources, and the provision of advanced broadband communication services to all Americans. In doing so, the merger will yield a number of significant affirmative benefits to the public interest. The Commission is well-suited to recognize and weigh these benefits in light of its statutory responsibilities.

1. The Transaction Will Promote Competition With Cable by Allowing Increased Spectrum and Satellite Resource Efficiency

For almost a decade now, both Congress and the Commission have made concerted efforts to open up the MVPD market to effective competition – Congress with the enactment of the Cable Television Consumer Protection and Competition Act of 1992 and the Satellite Home Viewer Improvement Act of 1999, and the Commission with its rules implementing these laws. Nothwithstanding these efforts, however, the MVPD market is still dominated by cable operators.[43] Both Congress and the Commission have noted this competitive problem on a myriad of occasions.[44] Moreover, policy makers and

---

[43] *See* Willig Decl. at ¶¶ 7-18, and below at 37-41, for an analysis of the relevant market.

[44] *See, e.g.*, S. Rep. No. 102-92, at 1 (1992) (explaining that Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") "to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor service."); *In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442 (1994) ("*First Competition Report*"), at ¶ 5 (observing that "Congress . . . found that without

regulators alike have envisioned DBS as the most promising alternative MVPD technology that could help alleviate this problem and ultimately cure it.[45]

DBS, however, remains fundamentally constrained by its dependence upon the radio spectrum for operations. DBS providers must use limited bandwidth from orbital locations that were not originally optimized for digital transmissions. The problem of finite bandwidth is seriously exacerbated by the currently duplicative use of the DBS spectrum. To help accomplish the Commission's vision of promoting DBS as a complete substitute for cable, DBS providers have had to offer subscribers programming services similar to those provided by cable systems, resulting in the use of each provider's spectrum for largely overlapping programming services.[46] For example,

---

competition, there was 'undue market power for the cable operator as compared to that of consumers and video programmers,' and that 'the cable television industry has become a dominant nationwide video medium.'" (citing 1992 Cable Act, §§ 2(a)(2-3), 106 Stat. 1460)); *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363 (rel. Mar. 16, 2000) (promulgating rules under SHVIA designed "to place satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming, and thus give consumers more and better choices in selecting a multichannel video program distributor.").

[45] Congress noted in 1999 that "with the development of high-powered satellite service, or DSS, which delivers programming to a satellite dish as small as 18 inches in diameter, the satellite industry now serves homes nationwide with a wide range of high quality programming. . . . it offers an attractive alternative to other providers of multichannel video programming; in particular, cable television." H.R. Conf. Rep. No. 106-464, at 91 (1999); *see also First Competition Report,* 9 FCC Rcd. 7442, at ¶ 62 (noting the Commission's expectation in 1990 that DBS "had the potential to 'readily compete with cable.'") (citing *Rate Deregulation & the Commission's Policies Relating to the Provision of Cable Television Service*, Report on Competition, 5 FCC Rcd. 4962 (1990)).

[46] In fact, the current duplicative use of this spectrum was not always the model for DTH satellite services. In the 1980s, when the Commission first authorized the DBS service, DTH satellite services were analog, meaning that each provider could not deliver much more than a handful of channels. Indeed, DBS itself was first contemplated as an analog service. The DTH satellite providers therefore planned to use their limited

currently, ECC and DIRECTV use portions of the same DBS spectrum, each with its own expensive satellite fleet, each to provide the same HBO channels, the same CNN channels, and in most cases the same local network channels to the same metropolitan areas.[47] DBS operators have attempted to mitigate this inefficient duplicative use of DBS spectrum by relying on upgrades in digital compression and other technologies to "squeeze" as many digital programming channels as possible in their licensed bandwidth, and indeed, to offer more channels and superior picture and sound quality relative to analog cable systems. In addition, DBS providers historically had no need to allocate channel capacity for the provision of local network signals because they were legally hampered from retransmitting them in most instances.

Today, however, DBS spectrum inefficiency has become progressively a more debilitating problem owing to a number of factors, including satellite mandatory carriage obligations and the increased competitive threat posed by the enhanced capabilities of digital cable. While the enactment of the SHVIA alleviated some of the disparity between DBS and cable program offerings by giving DBS providers a limited legal ability to retransmit local broadcast signals starting in November 1999, it did so at a significant cost – the unprecedented spectrum requirements associated with satellite mandatory carriage obligations. Without the merger, must-carry obligations will

---

capacity to provide programming services that generally complemented, rather than duplicated, one another. It was in that environment that the Commission decided to fragment the DBS spectrum into a patchwork of small channel assignments – issuing separate permits for 11, 3 or even 1 DBS channel at each orbital location. The emergence of digital DBS in the early 1990s and the desire to introduce price competition to cable systems made that paradigm completely obsolete, and led to the current problem of duplicative use of the DBS spectrum.

[47] *See* Joint Engineering Statement at 8-10.

effectively preclude the potential of effective competition with cable in all but the largest metropolitan areas now served by each DBS provider – DIRECTV now serves 41 local areas and ECC serves 36 local areas, for a total of 42 areas and with an overlap of 35 areas. All in all, each of ECC and DIRECTV expects to have to carry upwards of 300-400 local must-carry stations starting in January 2002, and most of these stations will be the same from one DBS provider to the other.[48] Must-carry is expected to bring the total of overlapping programs (both national and local) transmitted by the two companies to over 500.

Moreover, cable operators have aggressively upgraded the capacity of their systems to allow for the digital retransmission of video programming.[49] Although DBS's digital quality and former capacity superiority have allowed it initially to make inroads into cable's dominant market position, the roll-out of upgraded, digital cable

---

[48] For example, as of January 1, 2002, ECC expects that it will be required to transmit numerous local home shopping channels because of the satellite must-carry obligations imposed under the SHVIA. *See* 47 U.S.C. § 338 (Supp. V 1999) (as a condition of using the compulsory license made available by SHVIA for retransmission of local broadcast stations into their "home" market, DBS providers must carry, on request, the signals of *all* television broadcast stations located within the same local market, subject only to certain limited exceptions).

[49] *See* Comments of National Cable & Telecommunications Association responding to Notice of Inquiry, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 01-129, CS Docket No. 01-129 (dated Aug. 2, 2001), at 25-29 (describing cable companies' $50 billion investment in upgraded infrastructure over the past five years to facilitate "a broad range of video, voice and high-speed data possibilities, as well as improved signal reliability, improved pictures and two-way transmission capability."); *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6009 (2001) ("*Seventh MVPD Competition Report*") (Commission observation that "[v]irtually all the major MSOs offer Internet access via cable modems in portions of their nationwide service areas. . . . Many cable operators also are planning to integrate telephony and high-speed data access.").

facilities has compounded cable's incumbency advantages. A fully upgraded digital cable system now utilizes up to 750 MHz or 850 MHz of equivalent bandwidth, with no theoretical limitation on the ability to increase its bandwidth utilization by upgrading its physical plant.[50]

Digital cable also allows MSOs to offer a bundle of video and high-speed Internet access offerings, which has significantly and negatively affected the willingness of cable subscribers to switch to DBS, as well as other interactive broadband services. For example, many of the MSOs are now running trials of their Video on Demand ("VOD") products in test markets, and some have already commercially launched this service. One observer has noted that "VOD has emerged as the silver-bullet to DBS, and the MSOs are stockpiling for a 2002 showdown."[51] Even before that showdown, the impact of the video/Internet access/broadband bundle offered by cable has been acutely felt by the DBS providers. As a result of these developments, cable dominance persists and may yet be augmented.[52] Indeed, in its most recent annual cable competition report, the Commission notes that the cable industry continues to maintain a dominant position in the MVPD market, providing service to about 80% of the national MVPD

---

[50] The information capacity per MHz of a digital cable system is not limited by the signal propagation constraints inherent in DBS systems.

[51] Morgan Stanley, *Notes from NCTA 2001* (June 15, 2001); *see also* Deutsche Banc Alex. Brown, *Cable Industry Outlook*, Apr. 16, 2001, at 19, 38 (VOD is cable's "killer app" that will highlight cable's technological advances over DBS).

[52] Brigitte Greenberg, "VOD, High-Speed Data, Voice Keys to Cable Future, Operators Say," Communications Daily (Nov. 29, 2001) at 7 (noting cable operators' "optimism that services satellite couldn't deliver – video-on-demand ("VOD"), subscription VOD, interactivity, high-speed data and telephony – would solidify cable's relationship with current customers and bring many defectors to satellite back into fold.").

subscribership.[53]

Combining the satellite and spectrum resources of ECC and Hughes will eliminate the duplicative use of the limited amount of available DBS spectrum to deliver the same programming,[54] and allow DBS to compete more effectively against cable's recent offerings. Elimination of this duplication is an enormous efficiency resulting from the merger. The Commission is uniquely equipped to evaluate this benefit because the increased spectrum efficiency resulting from the merger would promote directly its long-standing policy in favor of efficient and non-duplicative use of the spectrum.[55]

The proposed transaction will do much more, however, than serve the Commission's spectrum policies in the abstract. Increased spectrum efficiency will translate into concrete benefits for customers, each recognized specifically by Congress or the Commission as important in its own right: more local channels to more markets; more high definition television ("HDTV") channels; better service to rural areas, Alaska and Hawaii; more diverse and educational programming; and broader availability of

---

[53] *See Seventh MVPD Competition Report*, 16 FCC Rcd. at 6008. Cable claimed more than a 77% share of the MVPD market in August 2001. *See* Comments of National Cable & Telecommunications Association responding to Notice of Inquiry, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, at 7.

[54] *See* Joint Engineering Statement at 8-9.

[55] *See, e.g., In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd. 3105, 3120 (1994), at 3120 ¶ 39 (1994) (recognizing the public interest in avoiding "duplication of programming" in the DBS service, which leads to "more diversity in programming for the consumer"); *cf. Hughes Communications Galaxy, Inc.*, 3 FCC Rcd. 7015 ¶ 2 (1988) (noting that use of the INTELSAT system "to duplicate programming already available on domestic satellites would be an inefficient use of the available radio spectrum"); *In re Revision of Radio Rules & Policies*, 7 FCC Rcd. 2755, 2783 (1992) (explaining that the Commission restricts duplicative use of spectrum utilized by commercial AM and FM radio stations with overlapping service areas because "[t]he limited amount of available spectrum could be used more efficiently by other parties to serve competition and diversity goals.").

satellite-based Internet access services. These benefits will in turn spur the incumbent cable operators to greater efforts for the benefit of cable as well as cable consumers.[56] In short, DBS spectrum efficiency will serve as a means to the all-important end: more vigorous competition in the MVPD market.

(a) More Local Channels to More Areas

New EchoStar will provide local broadcast programming to far more communities – 100 or more, including at least one city in each state, compared to the 36 and 41 metropolitan areas that ECC and DIRECTV each respectively serve now.[57] The inability to provide local programming has been recognized by Congress and the Commission as a significant impediment to DBS becoming fully competitive with cable.[58] The legal constraints that contributed to the competitive imbalance were

---

[56] *See, e.g.*, *Merger Impact on Cable: A Wall Street View,* skyreport.com (Nov. 26, 2001) *available at* http://www.skyreport.com/skyreport/nov2001/112601.htm#one (noting financial analysts' prediction that the advantages resulting from "a combination of DBS assets" would prompt cable to "convert their systems to 100 percent digital, ... become more aggressive in developing and distributing both broadband content and communications in order to drive the penetration of broadband connectivity," and to "bundle aggressively," with the end result being that "[c]osts to the consumer will come down through bundled pricing."); Valerie Milano, "Cable Sees PVRs as Serious Threat, SvoD the Answer," Communications Daily (Nov. 29, 2001) at 8 (pending merger will spur cable toward more innovation).

[57] *See* Joint Engineering Statement at 9. The total number of metropolitan areas now served by either DIRECTV or ECC is 42, with 35 of these areas served by both companies.

[58] In the Conference Report accompanying SHVIA, Congress declared that enabling DBS operators to offer local channels would "allow satellite carriers for the first time to provide their subscribers with the television signals they want most: their local stations," and "create parity and enhanced competition between the satellite and cable industries in the provision of local television broadcast stations." H.R. Conf. Rep. No. 106-464, at 93; *see also Seventh MVPD Competition Report*, 16 FCC Rcd. at 6010 ¶ 13 (observing that "[c]onsumers historically reported that their inability to receive local signals from DBS operators negatively affected their decision as to whether to subscribe to DBS .... Under SHVIA, DBS operators can offer a programming package more comparable to and competitive with the services offered by cable operators.")

alleviated somewhat by the passage of SHVIA. The limited channel capacity of DBS providers, however, as well as the burdens to be soon imposed upon that capacity in the form of satellite must carry, continue to limit DBS's ability – even with the implementation of spot-beam satellites and other new technologies – to offer local programming to many consumers. As a result, local-into-local service has for now been confined only to the relatively larger metropolitan areas.[59] The merger will dramatically expand the number of areas that can receive local broadcast station signals and will result in more vigorous competition to cable in these areas.

(b) More Programming Choices, Including HDTV Channels and More Pay-Per-View

New EchoStar also will have the ability to provide consumers with many more national programming choices than each company is able to provide standing alone. Just as the merger will eliminate the need to duplicate carriage of local channels, it will also eliminate the duplication of national channels, thereby freeing spectrum for more diverse programming choices. This includes more high definition programming that will encourage consumer adoption of digital equipment – another explicit Commission objective.[60] Currently, ECC and DIRECTV each offer a limited number of HDTV channels – 2 for DIRECTV and 3 full-time HDTV channels for ECC. The combined entity will be able to devote several times that number of channels to HDTV content,[61]

---

[59] *See* Joint Engineering Statement at Exhibit 2.

[60] *See, e.g., In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 5946 (2001) (stressing the Commission's desire for a "rapid" conversion to digital television ("DTV")); *id.* at 5950 ¶ 11 (Commission expressing its "agree[ment] that the wide availability of digital programming . . . will help speed the transition to DTV.").

[61] *See* Joint Engineering Statement at 10.

driving demand for both HDTV content and equipment, and breaking the vicious circle of too little HDTV content to drive consumers to purchase HDTV equipment and too little equipment to justify investment in more content.

The savings in spectrum that will result from the merger will also enable New EchoStar to offer greatly expanded pay-per-view ("PPV") and VOD-like[62] services – services that are very important to the economics and competitiveness of MVPD providers. For example, capacity can be devoted to caching (*i.e.*, saving for future viewing) on Personal Video Recorders, allowing users to play PPV movies or have access to specialty programming virtually on demand.[63]

(c) Expanded Product Offerings to Meet Competition from Digital Cable

The merger will enhance competition by enabling New EchoStar to compete better with new MSO product offerings made possible by the advent of digital cable. As mentioned above, the digital cable roll-out has allowed cable MSOs to offer consumers a broadband bundle, packaging the conventional video services with high-speed Internet access, VOD and other interactive services, and Internet telephony. These packages are increasingly popular with MVPD subscribers.[64] DBS, on the other hand, is competitively disadvantaged in this regard. The DBS spectrum to a consumer's home is

---

[62] *See* discussion in B(1)(c) below.

[63] *See* Joint Engineering Statement at 11.

[64] As early in the digital cable roll-out as 1998, the Commission recognized that "[m]ulti-service offerings and bundling services for sale seem to enhance subscription to alternative services offered by cable companies. . . . Indications are that customers value receiving these services through 'one-stop-shopping.' . . . For example, many large MSO's have found that bundling increases penetration of video and of new services." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, 24322 ¶ 60 (1998) (footnotes omitted).

now only one-way via satellite and needs to be supplemented by the use of different frequencies and satellites or by using terrestrial technologies to allow a broadband two-way offering. Both ECC and Hughes have attempted to create such broadband packages, ECC with its StarBand investment, and Hughes with its HNS DirecPC and DIRECWAY offerings. However, during the first year of service, subscription rates have been low, with only one percent of total DBS subscribers, less than 200,000, subscribing to these data services nationwide.[65] As will be seen below, next-generation satellite broadband services require significant investment and will be dramatically improved by combining the resources of both companies.

As mentioned above, the deployment of digital cable has also provided cable operators with the ability to offer new interactive services. These services include video-on-demand, information-on-demand (*e.g.*, sports scores, financial market information, electronic yellow pages, etc.) and electronic shopping services. These services are typically enabled through two-way interaction between the digital cable set-top and server equipment located at the cable operator's headend.

Even though the "one-way via satellite" architecture of a DBS operator does not allow for the same type of headend to set-top connectivity as exists in a digital cable system, a DBS service can provide many of the same types of interactive offerings as the digital cable operator *provided sufficient bandwidth for content distribution is available to the satellite operator.*[66] The latency of this type of service (*i.e.*, how quickly

---

[65] *See* Joint Engineering Statement at 14.

[66] In contrast to cable operators, a DBS provider enables its interactive services by the continuous broadcast of content "carousels" to its set-top boxes. Under the direction of either the operator or the consumer, each set-top box selects and presents or stores

the information is presented to the viewer) and depth of the service (*i.e.*, how much information is available to the viewer) is directly proportional to the amount of satellite bandwidth allocated to the content carousel associated with the service. Simply put, the more bandwidth that is applied to a service, the more interactive and robust (and consequently the more competitive) the consumer experience.

Thus the DBS spectrum efficiencies created through the merger will allow New EchoStar to offer satellite-based interactive services that can compete favorably against increasingly sophisticated digital cable offerings and at the same time provide rural consumers with access to interactive services they might otherwise not be able to obtain.

The merger also will enable New EchoStar to compete more effectively against cable companies (and the telephone companies) as a possible third line for a bundle of video/data/Internet services into the home. Cable companies with digital infrastructure can now offer consumers the attractive bundles of video, high-speed Internet access and other interactive services, and Internet telephony. As will be seen below, the merger will allow New EchoStar to provide a truly competitive broadband service, as the new entity will be able to combine the spectrum available to each company for broadband services and use the combined potential subscriber base to achieve more

---

information from the content carousel transmitted by the satellite. For example, in the case of an interactive financial information service, the consumer would identify the particular stock symbols of interest and the set-top box would wait for the relevant information to be transmitted over the carousel, "grab" it and display it to the consumer. If the content is transmitted frequently enough, this interaction appears to be instantaneous to the viewer. This content carousel approach applies not only to information-on-demand services but to almost any satellite-delivered interactive service, including video-on-demand services and electronic shopping services.

competitive price points and sustain the extraordinary high up-front capital investment that is required to launch quickly an advanced satellite broadband network.

New EchoStar will thus be able to establish a viable satellite-based Internet/data service that would compete with cable modem access and telephone lines as a third line into the home. This efficiency will confer significant consumer benefits by creating an effective competitive alternative in a line of business that is increasingly important to consumers – and in which consumer options currently are limited.[67]

(d) Better Service to Rural Areas, Alaska and Hawaii

Another major benefit of the newly-freed spectrum will be New EchoStar's ability to provide Americans living in rural areas, Alaska and Hawaii with more national programming networks and a better signal. [68] As explained above, by not duplicating each other's programming over the same spectrum, the combined entity will be able to offer a much greater variety of national networks than rural and remote areas can receive today.

This means that New EchoStar will be better able to provide subscribers in Alaska and Hawaii with a programming package more akin to what is available to their fellow citizens on the mainland today. Moreover, the combination of assets, including uplink facilities, will make more feasible the redeployment of finite satellite assets to non-CONUS western orbital slots, portending further improvements to service in Alaska and Hawaii.

---

[67] The necessity and importance of spreading the huge costs of pure broadband satellite services across the required critical mass of broadband subscribers is discussed in greater detail below.

[68] *See* Joint Engineering Statement at 10.

The same spectrum and satellite efficiency that will facilitate a greater variety of programming also will provide for a more reliable signal in all rural and remote areas. This could translate into any number of benefits, including potentially smaller dish sizes for some subscribers in remote areas such as Alaska and Hawaii.[69]

In addition, as discussed further below, citizens in rural America will also benefit from the extent to which the combination of ECC and Hughes will improve competition with cable incumbents in numerous metropolitan areas. National pricing is the most practicable and efficient method of DBS pricing, and New EchoStar will commit to continued uniform and non-discriminatory pricing and service throughout the country. As a result of national pricing, rural DBS customers will reap many of the benefits that enhanced competition with cable will provide to customers in non-rural areas. In effect, the national price will act as a conduit that allows the competitive dynamic in such important, highly competitive regions to have a beneficial impact on consumers throughout the nation, including in rural areas where cable does not exist.[70]

Finally, perhaps one of the largest benefits promised by the transaction for rural areas is that the merger will help make seamless satellite broadband a reality for all Americans – deploying faster to all regions, with greater applications and service offerings. Broadband deployment is discussed in more detail below.

(e) More Ethnic, Foreign Language and Niche Programming

The same principle of spectrum efficiency will apply to niche programming such as ethnic, foreign language, or other programs that appeal to

---

[69] *See* Joint Engineering Statement at 11.

[70] *See* Willig Decl. at ¶¶ 38-39.

specialized audiences. These audiences would have greatly expanded viewing opportunities with the additional programming available as a result of the merger. For example, the merged entity could provide several more channels of Spanish-language programming than the companies' combined current offerings, as well as increased exposure for foreign language programming with smaller followings – a very important benefit for audiences that desire this programming.

(f) More Educational Programming

The spectrum efficiencies resulting from the merger will allow the provision of additional educational programming, another area in which the benefits from the transaction serve explicit statutory goals. Congress has required DBS providers to set aside a percentage of their capacity for such programming,[71] but the qualified programmers using ECC's and DIRECTV's set-aside channels overlap. For example, DIRECTV and ECC now use different portions of the spectrum to provide the same C-SPAN and C-SPAN II feeds. Eliminating this overlap would free spectrum for additional public interest programming.

(g) Other Efficiencies That Will Result From the Merger

The combination will also allow the rationalization of the two companies' satellite fleets. These satellites are now inefficiently deployed due to the fragmentation of DBS spectrum assignments, which was in turn based on the now-discarded model of analog DBS. The deployment of satellites at 110° W.L. is a good example of this inefficiency. DIRECTV has a satellite at that location for the purpose of using its

[71] *See* 47 U.S.C. § 335(b) (1994) (DBS providers are required to set aside four to seven percent of channel capacity "exclusively for noncommercial programming of an educational or informational nature.").

assignment of only 3 DBS channels, even as EchoStar's EchoStar 5 satellite now located at that slot and the EchoStar 8 satellite to be launched to that slot are each equipped with 32 transponders and stand ready to use all of the spectrum at that location. The result is that the two DBS companies are constrained in their ability to compete by outdated requirements that are the equivalent of an airline being required to fly its planes only half-full. The merger will allow the companies to align their combined satellite fleet to the dictates of market efficiency.[72]

In addition, New EchoStar will achieve greater economies of scale and substantial cost synergies as a result of the integration of the ECC and DIRECTV satellite platforms. For example, the proposed merger will allow New EchoStar to offer a common service platform to new customers; to combine and improve each company's distribution networks; and to use the satellite uplink centers for new, rather than redundant, services. The resulting cost synergies resulting from such steps will include: reduced subscriber acquisition costs; reduced customer turnover, or "churn"; improved signal security as a result of moving to a standardized DBS service platform; reduced programming costs as a result of having a larger subscriber base; and the elimination of duplicative overhead.[73] All of these synergies will contribute to the creation of a dramatically stronger competitor to cable's dominance of the MVPD marketplace and will be manifested to the DBS consumer.

---

[72] *See* Joint Engineering Statement at 4-7.

[73] *See* Joint Engineering Statement at 2-3, 7-8, 12.

2. The Merger Will Have Other Significant Pro-Competitive Effects and Will Not Have An Anti-Competitive Impact In any of the Relevant Markets

MVPD Market. The merger will have significant pro-competitive effects – increased competition to cable operators – and will not have an anticompetitive impact in the relevant product market – the MVPD market. Recent technological and regulatory developments have left no doubt that the relevant market for purposes of analyzing this transaction, as previously defined by the Department of Justice ("DOJ"), is now "the delivery of multiple channels of video programming to the home . . . via . . . cable, satellite, or wireless technologies."[74] As Dr. Willig testifies, definition of a "relevant market" for the purpose of competition analysis of mergers depends crucially on demand substitution considerations – the degree to which consumers view the products as substitutable.[75] This ability to raise prices profitably is a function of the degree to which

---

[74] *See* Willig Decl. at ¶¶ 12-13 (discussing the relevant market determination made by the Department of Justice in the *Primestar* case.) In 1998, Primestar, a joint venture of large cable companies, sought to acquire rights to an orbital slot for nationwide DBS service that were held jointly by News Corp. and MCI Telecommunications Corp. DOJ sued to enjoin that acquisition, alleging that allowing cable operators through Primestar to control those DBS assets would eliminate the possibility that those assets could be used to compete against cable. In its complaint, DOJ alleged that the MVPD market was the relevant product market for the purpose of evaluating Primestar's proposed purchase of the DBS assets. *See United States v. Primestar, Inc.*, Civ. No. 1:98CV01193 (JLG) (D.D.C. May 12, 1998).

[75] *See* Willig Decl. at ¶ 8. In particular, the U.S. Department of Justice and Federal Trade Commission define a market "as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant." *Id.* (citing Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, *available at* http://www.usdoj.gov.atr.public/guidelines/horiz_book/toc.html).

consumers view two products as providing similar services or benefits. If one firm came to become the only provider of one of the products, but not the other, and if consumers found the products to be good substitutes, then the presence of the second product would prevent the firm from realizing an increase in profits by significantly raising its price. Therefore, the second product would directly constrain the price of the first product, and the relevant market would include the second product.

Dr. Willig has concluded, based on the business behavior of the DBS industry, federal government cases and studies, the views of the cable industry, and the views of independent analysts, that DBS prices are directly constrained by cable prices. Therefore, the relevant market for evaluating the merger of ECC and DIRECTV includes cable providers.[76]

For example, Dr. Willig observes, DBS pricing decisions appear to be driven by competition with cable companies, as the stated primary objective of both companies is to gain market share by luring consumers away from the leading cable providers, and the firms accordingly price their DBS programming services at levels based primarily on the prices charged by cable providers. Additionally, Dr. Willig observes that each company has laid claim to success in luring subscribers away from cable, which is corroborated by public statements of cable companies attributing DBS subscriber growth to aggressive efforts by DBS to target cable customers, the fact that the

---

[76] Indeed, Dr. Willig explains that the market is dynamic and the boundary of the market in which DBS providers compete may well expand. As bundled packages with digital television, high-speed Internet access, and video-on-demand become relatively more important in the MVPD market, the participants in the relevant market may grow beyond the historical MVPD participants to include DSL providers, incumbent phone companies, and cellular phone providers. *See id.* at ¶ 17.

cable industry itself views DBS as a significant competitor, and the acknowledgement by cable companies that their pricing and advertising strategies are influenced by competition from DBS.

Dr. Willig also notes that a number of cases and studies by the federal government confirm that cable firms are part of the relevant market. The DOJ, for example, found that the MVPD market was the relevant market in the *Primestar* case, discussed above. And in its annual analysis of competition in video programming, the FCC groups the cable industry and the DBS industry in the MVPD market.[77] The FCC has also concluded that DBS and cable services are substitutes.[78] In sum, Dr. Willig concludes, the relevant market for analyzing a merger between ECC and DIRECTV is the MVPD market.[79]

As previously noted by the Commission, over 96 percent of all television households in the United States are passed by cable television systems and these cable

---

[77] *See Seventh MVPD Competition Report*, 16 FCC Rcd. 6037, at ¶ 61.

[78] In its 2000 *Report on Cable Industry Prices*, the FCC concluded that DBS puts statistically significant downward pressure on demand for cable services. The report continues to state that "DBS is a substitute for cable services. This result is different from our earlier finding reported in the *1999 Price Survey Report*, which showed DBS exerting only a modest influence on the demand for cable service. One explanation for the increased importance of DBS as a competitor of cable is the passage of . . . [SHVIA] in November 1999, which eliminated the prohibition on DBS delivery of local network signals into their local television markets. The two DBS operators have begun offering local signals in many major television markets thus more closely matching services provided by cable operators." *See In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment,* Report on Cable Industry Prices, 16 FCC Rcd. 4346, 4364 (2001), ¶ 53.

[79] Dr. Willig also explains that, for the purposes of evaluating the competitive impact of the proposed merger, the national pricing for monthly subscription and programming fees by both EchoStar and DIRECTV suggest that a national-level analysis is the most appropriate. *See* Willig Decl. at ¶ 18.

operators continue to be the dominant distributors in the national MVPD market.[80] Indeed, cable television operators maintain nearly an 80 percent share of the total MVPD market.[81] DBS also competes with a number of other MVPD distributors using different transmission media, such as wireless cable, SMATV, open video systems, direct-to-home analog and digital satellite offerings, cable overbuilds and electric utilities.[82] In addition, there may soon be a number of new providers using technologies and frequency bands that will compete in this market, including terrestrial point-to-multipoint services in several fixed service bands and potential new satellite entrants.[83]

Evaluated in this market, the proposed merger will have decidedly pro-competitive effects. The effect on competition is not adequately measured by the number of competitors, but rather by their effectiveness. As the DOJ and the Commission have recognized, increasing the effectiveness of DBS competition (and thus ensuring adequate MVPD competition) may only be achievable by foregoing additional DBS competitors.[84]

---

[80] *See Seventh MVPD Competition Report*, 16 FCC Rcd. 6005, at App. B, Table B-1 (noting that approximately 96.6 percent of U.S. households with at least one television were passed by cable at the end of 1999); *MCIT*, 15 Comm. Reg. (P&F) 1038, at ¶ 16.

[81] *Seventh MVPD Competition Report*, 16 FCC Rcd. 6005 at ¶ 15.

[82] *Id.*

[83] *See, e.g.*, OpTel, Inc.'s Request for Action, *In the Matter of Petition for Rulemaking To Amend 47 C.F.R. § 101.603 and Related Rules – To Allow the use of 12 GHz OFS Frequencies for the Delivery of Video Programming Material*, CS Docket No. 99-250, RM-9257 (dated Nov. 6, 2001).

[84] For example, when the Commission considered the application of an ECC subsidiary to acquire additional DBS licenses, the Department of Justice commented that "MVPD competition is best served by the emergence of a strong high-power DBS competitor with enough capacity to compete effectively with cable." Comments of the United States Department of Justice, *In the Matter of the Application of MCI Telecommunications Corp. and EchoStar 110 Corp.*, File No. SAT-ASG-19981202-00093, at 8 (Jan. 14, 1999). The Commission agreed: "[W]e view the potential competitive benefits of allowing EchoStar to become a stronger competitor in MVPD

As described above and by Dr. Willig, the transaction will result in improved and expanded programming choices for consumers, as well as the provision of innovative new services, which will make New EchoStar a better competitor to cable.[85] Indeed, as all cable firms roll out their digital upgrades, DBS has a narrow window of opportunity to ignite full-scale competition as cable customers transition to digital service, before consumer inertia and the high switching costs from cable to DBS leave consumers locked in, and cable further entrenched. Moreover, as Dr. Willig discusses, the characteristics of the MVPD market in general and of DBS firms in particular "make it very unlikely that a merger of EchoStar and DirecTV would result in higher prices and lower output through either coordinated behavior among participants in the MVPD market or unilateral behavior by the merged firm."[86]

As outlined above, this transaction will produce enormous benefits for all Americans, including the small percentage of U.S. households that are not currently passed by cable operators. These sparsely populated areas already are being served by a number of C-band providers that are beginning to roll out new digital offerings (*e.g.*, 4DTV products) and offer over 500 programming channels.[87] These products remain very attractive, particularly in areas where dish size is not a significant deterrent.

---

markets as outweighing the potential competitive costs of reduced entry into the DBS industry." *MCIT*, 15 Comm. Reg. (P&F) 1038, at ¶ 21.

[85] Willig Decl. at ¶¶ 23-24 (discussing merger specific efficiencies that will lead to benefits such as greater geographic coverage of local channels, more specialty, ethnic and foreign language programming, interactive television services, and video-on-demand).

[86] *Id.* at ¶ 6.

[87] *Satellite Today*, C-Band Subscribers on Motorola's Front Burner, April 13, 2001. *See also*, www.4DTV.com.

In addition, recognizing the concerns of consumers in the 3.4% of U.S. television households not passed by cable,[88] New EchoStar is committed to pricing its DBS services on a uniform, nationwide basis. This means that, after the merger, the few consumers in areas not served by cable will in fact benefit from the intensified MVPD competition that will exist in all other areas where New EchoStar will compete with cable. In this way, these rural customers will obtain the benefits of competition between and among DBS, different cable MSOs, as well as the newer cable overbuilders and other emerging competitors offering other solutions throughout the country that increasingly are promoting and comparing their digital offerings to DBS. In other words, those consumers located in sparsely populated areas not currently served by cable will obtain DBS service at prices developed as a result of the more vigorous competition among New EchoStar and the 8 or 9 largest cable operators and other new entrants providing overbuild and other solutions in the rest of the country. In short, not only will the merger not have an anti-competitive impact in rural areas, it will produce tangible competitive benefits for consumers in those areas, too.

Programming. The programming market also will benefit from the proposed merger as a result of the more efficient use of spectrum and the creation of a much stronger alternative distribution outlet for programmers not affiliated with cable MSOs. In this regard, the proposed merger will not create the types of vertical relationships that raised concern in other transactions. The DOJ and the Federal Trade

---

[88] *See* note 81, *supra*. The Commission noted that there were approximately 100.8 million television households during the 1999-2000 television season. *See Seventh MVPD Competition Report*, 16 FCC Rcd. 6005, at ¶ 18. Based on this total, it may be estimated that roughly 3.4 million are not passed by cable.

Commission have brought a number of cases addressing the vertical relationships between cable MSOs and competition in programming that were settled by consent decree.[89] In contrast, the Merger Parties do not intend to pursue a strategy of vertical integration with programmers post merger. Combined with the amount of available spectrum that will be freed up, this absence of vertical integration will help create a significant outlet for existing and new non-affiliated cable programmers, which now find it difficult to obtain carriage on the platforms of vertically integrated cable operators.[90]

3. The Merger Will Promote Deployment of Advanced Broadband Services to All Americans

The merger of ECC and Hughes will have a profoundly positive effect on the deployment of facilities-based, advanced, two-way, broadband services via satellite to all Americans, especially in rural areas outside the reach of other broadband alternatives such as DSL and cable modem services. The combined resources of ECC and Hughes will enable the merged company to accelerate and better promote the deployment of such services to both rural and urban markets.[91] This will support the Congressional and Commission policy objectives of providing affordable, high-speed Internet access to all Americans, particularly those living in rural areas.

---

[89] *See, e.g.*, Time Warner Inc., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions, 62 Fed. Reg. 11202 (Federal Trade Comm'n Mar. 11, 1997) (consent order).

[90] Gary Thorne, President of Moviewatch, a programming service expected to premiere next year, underscored this potential benefit, observing that with the proposed merger "the additional spectrum at least gives us opportunities to place networks. Because if there was – if there is – one place where spectrum eventually does get used up, it's on the satellite side of the world." Linda Moss, *New Nets Squeeze Into Consolidated Market*, Multichannel News, Nov. 26, 2001.

[91] *See* Joint Engineering Statement at 14-16.

The Telecommunications Act of 1996 specifically directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . ."[92] In its most recent annual report on advanced broadband services, the Commission emphatically stated its commitment "to ensuring that advanced services become available to all Americans."[93] The Commission went on to note, however, that certain consumers (*e.g.*, those in rural areas) are "particularly vulnerable" to not receiving such services.[94]

Satellite systems are especially well-suited for the provision of broadband services in rural and other underserved areas and for providing a critical competitive alternative in suburban and urban environments. Satellite systems have nationwide coverage areas and are able to offer high-quality, ubiquitous service as soon as the satellite system is launched and operational. As such, satellite systems offer instantaneous deployment to low-population density and low-income areas that may not have enough demand to justify a terrestrial build-out.[95]

---

[92] *See* Telecommunications Act of 1996, Tit. VII, § 706(a), Pub. L. No. 104-104, 110 Stat. 153 (1996), *reproduced in* the notes following 47 U.S.C. § 157 (Supp. 2001).

[93] *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd. 20913, 20917 ¶ 8 (2000) ("*Second Report*").

[94] *Id.* at 20918.

[95] In addition, satellites offer ubiquitous service at prices that are distance insensitive, in contrast to the distance-based prices that are characteristic of many terrestrial networks. These advantages allow satellite operators to provide first- and last-mile connectivity more cost-effectively than terrestrial systems, which have historically focused their deployment on high-density urban areas. *See Extending Wireless Telecommunications Services to Tribal Lands*, Notice of Proposed Rulemaking, FCC 99-205, WT Docket No. 99-266, ¶ 24 (rel. Aug. 18, 1999).